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JURISDICTIONAL STATEMENT

This case involves the interpretation and validity under the Missouri Constitution of appropriations to the Missouri Department of Health in fiscal years 2000 and 2001. On August 7, 2001, this Court sustained Appellants/Cross-Respondents' application to transfer the case to this court from the Court of Appeals for the Western District prior to opinion because of the "general interest and importance" of the questions involved. This Court's jurisdiction on transfer arises under Article V, § 10 of the Constitution of Missouri.

STATEMENT OF FACTS

A. Introduction

This litigation involves appropriations to the Missouri Department of Health of funds to be used to subsidize the provision of family planning services (the "program"). The appropriations contain elaborate restrictions relating to the eligibility of entities to participate in the program if the entities are affiliated with abortion providers. Defendants-Appellants/Cross-Respondents ("Planned Parenthood") are longstanding program participants and are affiliated with abortion providers. The Director of the Department of Health ("Director"), with the advice of the Attorney General, construed three undefined terms in the restrictions that regulate the relationship between program participants and abortion affiliates. Under her construction of those terms, Planned Parenthood is eligible to participate in the program. The State commenced this litigation asserting that the Director's

construction is illegal and that, under the construction of the terms urged by the Special Assistant Attorney General ("SAAG") appointed to represent the State, Planned Parenthood is not eligible for the program.

The case was previously before this Court. In State v. Planned Parenthood of Kansas and Mid-Missouri, 37 S.W.3d 222 (Mo. banc 2001), this Court reversed a judgment of the Circuit Court of Cole County, and remanded the case to that court. This Court directed that the trial court: (a) require the Attorney General to state "clearly and specifically" the extent of the authority granted to the SAAG to pursue claims against the Director, and take such further action as appropriate; and (b) reconsider its judgment in light of then-recently issued federal regulations and, again, take such further action as appropriate. P.R.L.F. at 5–6; [1] A4–5. Those remand proceedings have been concluded. The trial court has rendered a new judgment, and this is an appeal from that judgment.

[1] As used herein, "P.R.L.F." refers to the legal file for the proceedings subsequent to this Court's remand of the case to the trial court. "L.F." and "S.L.F" refer to the Legal File and Supplemental Legal File, respectively, filed as part of the record on appeal in the prior appeal in this Court. This Court has taken judicial notice of that record on appeal pursuant to Planned Parenthood's motion. Letter from Clerk of the Supreme Court to Counsel for Planned Parenthood, August 8, 2001.

B. The Appropriations and Their Title X Proviso

1. The Appropriations

The appropriations state that the funds are for the purpose of funding family planning services, pregnancy testing and follow-up services, and that the funds may not directly or indirectly subsidize administrative expenses or abortion services. L.F. at 0014; P.R.L.F. at 46; A8. Program participants may not "directly refer patients" to abortion providers, counsel patients "to have abortions," or "display or distribute marketing materials about abortion services." L.F. at 0014-15; P.R.L.F. at 46; A8. Program participants may be affiliated with abortion providers. L.F. at 0015; P.R.L.F. at 46; A8. However, the abortion affiliates must be separately incorporated; the program participants and the abortion affiliates must not have "similar name[s];" and they may not "share" medical or non-medical facilities, expenses, employee wages or salaries, or equipment or supplies. L.F. at 0015; P.R.L.F. at 46-47; A8-9.

The appropriations define many of the terms they use, such as "family planning services," "follow-up services," and "abortion services." L.F. at 0014; P.R.L.F. at 46; A8. However, they do not define "share," "similar names," "directly refer," "marketing materials," and "administrative expenses." L.F. at 0013-18; P.R.L.F. at 46-49; A8-11. The Director defined some of these terms, specifically: "share" (L.F. at 1329, 1335-36), "similar names" (L.F. at 1328, 1335), and "administrative expenses" (L.F. at 1333). The terms "directly refer," "marketing material," and "counseling patients to have abortions" remain undefined.

The appropriations also state that their restrictions shall not prevent program participants that also receive federal family planning funds pursuant to Title X of the Public Health Service Act from providing any service required by Title X ("Title X proviso"). L.F. at 0015-16; P.R.L.F. at 47; A9. Thus, to the extent that Title X requires that certain counseling, information, or referrals be offered to clients, doing so does not violate the appropriations.

2. Title X

Title X, 42 U.S.C. § 300, *et seq*., is the federal family planning program. Title X subsidizes projects that provide family planning services to low income individuals. In 1993, the Department of Health and Human Services (HHS) repealed the then-existing Title X regulations; proposed new regulations; and directed that, pending the adoption of final regulations, Title X be administered pursuant to "the 1981 Family Planning Guidelines." 58 Fed. Reg. 7462 (Feb. 5, 1993) ("1981 Program Guidelines") (located at L.F. at 2046–2047). The final regulations were promulgated on July 3, 2000. 65 Fed. Reg. 41270 (July 3, 2000) (located at P.R.L.F. at 269–277; A12-22).

Thus, at the time the FY 2000 appropriation was in effect, Title X was operated under the 1981 Program Guidelines. During FY 2001, Title X was operated under the then newly issued regulations.

The regulations, however, did not establish new or different requirements. Rather, as explained in the Supplementary Information accompanying the regulations, the regulations "incorporate **[]** in the regulatory text the policies relating to nondirective counseling and referral of the 1981 Program Guidelines. . . " Id. at 41271 (located at

P.R.L.F. at 269B; A13); see generally id. at 41270-74 (located at P.R.L.F. at 269A-271; A12-16). Thus, by looking at what HHS stated in the regulations, this Court has the benefit of HHS's own, and definitive, statement of what the Title X policy has required during both FY 2000 and FY 2001.

The regulations state that a Title X grantee "must":

> (i) Offer [the] pregnant woman the opportunity to [be] provided information and counseling regarding each of the following options:
>
> Prenatal care and delivery;
>
> Infant care, foster care, or adoption; and
>
> Pregnancy termination.
>
> (ii) If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant woman indicates she does not wish to receive such information and counseling.

42 C.F.R. 59.5 (a)(5); 65 Fed. Reg. 41270 at 41279 (located at P.R.L.F. at 276; A21).

Under this regulation, a Title X grantee must offer a woman information and counseling regarding her options, including abortion, for managing her pregnancy. If requested, the grantee must provide "neutral, factual information." P.R.L.F. at 276; A21. This counseling and information is not to cover all options regardless of the patient's expressed interests. Rather, option(s) about which the woman indicates she does not wish information are to be left out. The same is true for referrals. Title X requires that

referrals not be given for all options, but be given for all options except those for which the woman indicates she does not want to receive information. P.R.L.F. at 276; A21.

C. The Director's Construction of the Appropriations' Undefined Terms

As even one of the sponsors of the appropriations acknowledged, some of appropriations' undefined terms are ambiguous and amenable of differing construction: "'Share' was not defined. . . there's several definitions of what 'share' could mean. . . " L.F. at 1409.

Accordingly, the Director defined the three most obviously ambiguous terms: "share," "similar name," and "administrative expenses." The Director conferred with the Attorney General regarding her construction of these terms and, as she subsequently advised a Senate Committee, the Attorney General "concur[red] that the [Department] ha[d] complied with the appropriation. . ." L.F. at 1458.

1. Administrative Expenses

The appropriations state that their funds may not be used for "administrative expenses." The Director defined "administrative expenses" broadly:

> any administrative budget category that cannot be traced to the direct delivery of services provided pursuant to this contract, including but not limited to, indirect salaries, supplies, rents, utilities, and other overhead costs.

L.F. at 1333. Thus, under the Director's construction, no state funds can be used for any expense that is not involved in the direct delivery of the program's clinical services.

2. Share

The appropriations forbid participants from sharing facilities, expenses, wages, and equipment with abortion-affiliates. The Director defined "share":

> services, employees, or equipment that are provided or paid for by the [program participant] on behalf of the [abortion affiliate] without payment or financial reimbursement from the [abortion affiliate].

L.F. at 1329, 1335-36. Thus, under the Director's construction, services, employees, and equipment are not shared if the abortion affiliate financially reimburses the program participant for them.

3. Similar Names

The Director defined "similar names" by reference to the "applicable corporation statutes of Missouri." L.F. at 1328, 1335. Thus, under the Director's construction, if two corporate names are sufficiently distinguishable from each other for purposes of incorporation in Missouri, then they are not "similar" for purposes of the appropriations' rules.

D. Procedural Background

1. Pre-remand Proceedings

When the first appropriation (FY 2000) containing the restrictions was enacted, Planned Parenthood feared that the restrictions would be construed in a manner such that compliance would be extremely expensive and destructive to Planned Parenthood and their abortion-affiliates' ability to continue to exist. To protect their rights, and those of its patients, Planned Parenthood filed an action against the Director in the United States District

Court, claiming that the restrictions were unconstitutional as applied to them. Planned Parenthood v. Dempsey, No. 99-4145-CV-C-5 (W.D. Mo. filed June 22, 1999). The Attorney General appeared on behalf of the Director.

Shortly after the federal litigation was filed, the Director (with the advice of the Attorney General) promulgated her construction of the three undefined terms: administrative expenses, share, and similar names. L.F. at 1328-29, 1333, 1335-36. Planned Parenthood complied with the restrictions as they had been construed by the Director, and contracted with the Director to continue providing family planning services.

In addition to appearing in the federal litigation to defend the Director, the Attorney General also appointed the SAAG to intervene in the litigation on behalf of the Legislature. S.L.F. at 71. When the SAAG moved to intervene, however, he went considerably further. He sought also to assert claims against the Director that her construction of the restrictions was illegal, and claims against Planned Parenthood that they were not eligible to participate in the program under the SAAG's asserted construction of the restrictions. S.L.F. at 10–23, 78–95.

Subsequently, the Attorney General withdrew the SAAG's original appointment and appointed the SAAG to represent the State. He authorized the SAAG to intervene the State in the federal case to defend the constitutionality of the appropriation's restrictions, and to commence this action in the state courts. The Attorney General's appointment letter stated that the SAAG was not authorized to file an action against the Director. S.L.F. at 134–135.

Then, the SAAG filed this action in the Cole County Circuit Court. The original petition asserted all of the same claims as were in the SAAG's federal court intervention

papers: that the Director's construction of the restrictions was illegal, that Planned Parenthood was not eligible under the SAAG's construction of the terms in the restrictions, and that the restrictions were constitutional. L.F. at 0001–0028. The State's Petition did not name the Director as a defendant. Id. On consent of all the parties, however, she was subsequently added as a necessary party. S.L.F. at 1–41. Thereafter, the SAAG amended the State's Petition, adding the Director as a defendant, and adding her name to the claims asserting that her construction of the restrictions was illegal. L.F. at 0115–0148.

When the state court action was filed, the federal court granted Planned Parenthood's (plaintiffs in the federal court) motion for abstention. L.F. at 0144. The federal court stayed further proceedings until the conclusion of the state court proceedings, and reserved its right to determine the federal constitutional issues.[2] Id. The federal court proceedings remain

[2] In order to preserve their right to litigate their federal constitutional claims in federal court, Planned Parenthood advised the trial court of the nature of those claims and otherwise did not address them substantively. L.F. at 0043, 0082, 1370-1371; P.R.L.F. at 76–77. See England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411 (1964). They do the same here. Planned Parenthood's federal constitutional claims are that the construction of the appropriations urged by the SAAG and upheld by the trial court would be unconstitutional as applied to Planned Parenthood, in that such a construction would be a penalty on the exercise of constitutional rights, specifically the Fourteenth Amendment right to choose abortion and the First Amendment right to associate.

stayed at this time; however, the federal court has issued an order requiring the parties to proceed with the federal court case by filing a scheduling order on March 8, 2002.

The original trial court judgment was rendered on cross motions for summary judgment. L.F. at 0343–1309, 1358–1728. The central point of dispute was which construction of the undefined terms of the appropriation was correct: the Director's, or the SAAG's.

The trial court declared the Director's construction of the terms "similar names" and "share" to be illegal; declared Planned Parenthood ineligible to participate in the program, and enjoined Planned Parenthood from participating in the program; and enjoined the Director from construing the restrictions in violation of the "plain language of [the appropriation] as defined herein." L.F. at 2118. However, the trial court provided no definitions or other construction of the restrictions. L.F. at 2115–2119. The original judgment also ordered Planned Parenthood to repay the funds already received for services already rendered, L.F. at 2118, and declared that the restrictions violated neither the Missouri nor the United States Constitution. L.F. at 2119.

On appeal, this Court held that there were "significant constitutional issues" related to the State suing the Director over her construction of the terms of a statute that she is authorized to implement, but that it appeared that, in pursuing those claims, the SAAG was exceeding the authority granted by the Attorney General. P.R.L.F. at 5; A4-5. Thus, rather than address those issues, this Court remanded the case, and directed that the Attorney General clarify the SAAG's authority. Id.

This Court also noted that the appropriation stated that its restrictions were not to be construed to prevent a program participant that was also a grantee participating in the federal family planning program (Title X) from providing any service required by Title X. P.R.L.F. at 6; A5. The trial court had not addressed the effect of the Title X regulations on the issues before it. Thus, this Court also directed that the trial court reconsider its judgment in light of the Title X regulations. P.R.L.F. t 6; A5-6.

2. Post-remand Proceedings

After this Court's remand, the Attorney General issued two letters setting forth the SAAG's authority. Those letters authorize the SAAG to pursue claims on behalf of the State that Planned Parenthood was not eligible for contracts for FY 2000 and FY 2001, to enjoin Planned Parenthood from receiving funds for those fiscal years, and to recover funds received for those fiscal years. P.R.L.F. at 50–54; A23-27. Those letters also state that the SAAG is not authorized to pursue "any action or claim of any sort" against the Director. P.R.L.F. at 51; A24.

Following receipt of these letters, the SAAG filed a Second Amended Petition that deleted (in form, but not in substance) all of the claims against the Director, and added the FY 2001 appropriation to the litigation in order to bring the litigation up to date. P.R.L.F. at 9–55. Planned Parenthood filed a Second Amended Answer. P.R.L.F. at 56–73. The parties simultaneously filed dispositive motions.

The State moved for summary judgment, and re-argued all of the issues previously addressed by the trial court. P.R.L.F. at 178–229. Planned Parenthood's motion took the position that the only issues before the trial court were those framed by the remand: the

question of the State's authority to proceed on the claims it was making, and the question of whether Planned Parenthood's counseling and referral practices were mandated by Title X. P.R.L.F. at 75, 164. The Director (represented by the Attorney General) did not file a motion, but did file a brief asserting that her construction was legal. P.R.L.F. at 230–244.

The pleadings and motions made clear that, although the Second Amended Petition did not explicitly assert a claim against the Director, the basis of the State's claim that Planned Parenthood was not eligible for the program remained the same as pre-remand: that the Director's construction of the appropriation's undefined terms was illegal, and that Planned Parenthood did not comply with the SAAG's asserted construction. P.R.L.F. at 74–177, 178–229, 245–277, 278–336. Planned Parenthood's position was also the same as pre-remand: that they complied with the Director's construction, and that the Director's construction was legal. P.R.L.F. at 74-177, 245–277. The Directors' position was, as it had been pre-remand, that her construction was legal. P.R.L.F. at 230–244.

Planned Parenthood's motion argued, first, that the Second Amended Petition should be dismissed because the Attorney General had explicitly prohibited any "action or claim of any sort" against the Director. P.R.L.F. at 165–166. Thus, Planned Parenthood argued, the SAAG lacked the authority and thus the State lacked the capacity to pursue the actual claim at the center of the Second Amended Petition: the State's assertion that the Director illegally construed the statute. Id. Second, Planned Parenthood's motion argued that federal Title X regulations issued in July, 2000, left no question but that Planned Parenthood's counseling and referral practices are mandated by Title X. P.R.L.F. at 171–175. On all of the other issues, which the State sought to re-litigate—the legality of the Director's construction; the

constitutionality of the appropriations; and the proper course for the trial court to follow if it concluded that the Director's construction was illegal—Planned Parenthood rested on the positions they had asserted in the pre-remand proceedings.[3] P.R.L.F. at 164.

E. The Judgment Below

First, the trial court concluded that the SAAG had the authority to assert the claims raised by the State in its Second Amended Petition, and denied Planned Parenthood's motion to dismiss. P.R.L.F. at 359; A28. The trial court did not, however, explain why it concluded that the SAAG was authorized to pursue a claim that the Director's construction was illegal (especially when the Director was defending the legality of her construction) in light of the Attorney General's clear admonition that the SAAG was not authorized, "to file, maintain, or pursue any action or claim of any sort against the Director." P.R.L.F. at 359–364; A28-33; P.R.L.F. at 51; A24.

Second, the trial court concluded that Planned Parenthood was not eligible for the program because they had abortion affiliates with "similar names," and because they "shared" facilities, expenses, employee wages and salaries, and equipment with their abortion affiliates. P.R.L.F. at 361; A30. The trial court could not have reached this conclusion without invalidating the Director's construction of those terms. Yet, the trial

[3]The State also reasserted dozens of material facts it claimed were not in dispute. Planned Parenthood responded to the State's factual assertions—indicating which facts it disputed, and which facts they admitted. P.R.L.F. at 246–260.

court nowhere states that it is invalidating the Director's construction, nor does it give any explanation of how it is construing those terms. P.R.L.F. at 359–364; A28-33.

The trial court also concluded that Planned Parenthood counseled patients to have abortions, distributed marketing materials about abortion services, and directly referred patients to abortion providers in violation of the appropriations. P.R.L.F. at 361; A30. Yet, the trial court provided no construction of these terms to explain its conclusions that Planned Parenthood's practices violated these prohibitions. P.R.L.F. at 359–364; A28-33. The trial court also concluded, however, that these practices did not render Planned Parenthood ineligible to participate in the program because they are mandated by Title X. Thus, the trial court granted Planned Parenthood's motion for summary judgment on the Title X issue. P.R.L.F. at 361–362; A30-31.

The trial court reiterated its conclusions that the restrictions are constitutional under the state and federal constitutions. P.R.L.F. at 362; A31. It offered no explanation for either holding, nor for its decision to reach the federal constitutional question in light of Planned Parenthood's and the federal court's explicit reservation of its right to adjudicate the constitutionality of the restrictions under the federal constitution. P.R.L.F. at 362; A31.

Finally, again as in its original judgment, the trial court ordered that Planned Parenthood repay the funds they had received from the FY 2000 appropriation. P.R.L.F. at 363; A32.

F. The Undisputed Facts About Planned Parenthood and Their Abortion Affiliates[4]

Both Planned Parenthood of Kansas and Mid-Missouri ("PPKM") and Planned Parenthood of the St. Louis Region ("PPSLR") are affiliated with separately incorporated abortion providers. L.F. at 0344-45, 0350, 0359, 1791, 1793, 1797. These abortion affiliates are named, respectively: Comprehensive Health Services of Planned Parenthood of Kansas and Mid-Missouri ("CHS"), and Reproductive Health Services of Planned Parenthood of the St. Louis Region ("RHS"). Id. RHS is incorporated in Missouri. CHS is incorporated in Kansas, but its name would have been acceptable for incorporation in Missouri.

CHS is located in a building owned by PPKM, and RHS is located in a building owned by PPSLR. L.F. at 0350-52, 0359-60, 1793-94, 1797-98. Both abortion affiliates occupy full and separate floors allocated solely to their services. L.F. at 0351, 0360, 1793, 1798, 1805–1806. Both abortion affiliates occupy their spaces under leases that require payment of market rents and apportioned shares of all other occupancy-related expenses such as water, electricity, etc. L.F. at 1800–1801, 1806, 1935–1936, 1941–

[4] The trial court granted summary judgment to the State. There was no trial or other proceeding by which disputed facts were determined. The facts set forth in the text are those facts that were not disputed by Planned Parenthood. They are the only facts upon which this Court can review the trial court's judgment and, as summary judgment was granted against Planned Parenthood, all reasonable inferences must be drawn to favor Planned Parenthood. Heins Implement Co. v. Missouri Highway and Transp. Comm'n, 859 S.W.2d 681, 693 (Mo. banc 1993).

1953, 1960–1962, 1963–1981. These apportioned amounts are determined according to generally accepted accounting practices. L.F. at 1800-01, 1806, 1936, 1962.

In PPKM's building, there are two street level entrances, one for each floor of the two-story building. One entrance provides access to the CHS clinic, which is the sole occupant of the ground floor. L.F. at 0360, 1798, 1806. The other entrance provides access to the PPKM administrative offices and community education and resource center, which are the sole occupants of the second floor. PPKM provides no clinical services at this site. L.F. at 0360, 1798, 1805–06.

In PPSLR's building, there is one entrance to a three story building which houses PPSLR's administrative offices on one floor, PPSLR's health clinic that provides the program services on another floor, and the RHS clinic on the remaining floor. L.F. at 0351, 1793. Anyone coming to the PPSLR building uses the same parking lot and shuttle, enters the building through the same entrance, passes through the same security screening system, and uses the same lobby and the same elevator. L.F. at 0351, 0358, 1794, 1797, 1800. Moreover, there is one lunchroom in the building, one conference room, one staff restroom, and one staff locker-room, all utilized by staff of both PPSLR and RHS. L.F. at 0351-0352, 1794, 1800. Staff members of PPSLR and RHS are also able to communicate via internal electronic mail. L.F. at 1802. However, to be clear: the clinical facility providing program services, and the abortion affiliate's facility are completely separate.

Both PPKM and PPSLR provide management services for their respective abortion affiliates. In both instances, pursuant to written agreements, the abortion

affiliates purchase these services, either based on time records that track time in ¼ hour increments, or based on allocation formulae that conform to generally accepted accounting principles. L.F. at 1802-03, 1806, 1936, 1961, 1938-1940, 1982-87. In addition to these payments, both abortion affiliates pay separate fees to assure that neither PPKM nor PPSLR inadvertently subsidizes the provision of these management services. L.F. at 1803, 1807, 1939, 1984-85.

However, while management services are provided by Planned Parenthood's employees to their respective abortion affiliates, and paid for by the abortion affiliates, this is not the case with clinical employees. All *clinical* employees work either entirely and exclusively in Planned Parenthood's health clinics, or entirely and exclusively in the clinics of the abortion affiliates.[5] L.F. at 1803, 1814, 1828.

[5] The clinical staff of CHS are employees of CHS. The clinical staff of RHS are employees of PPSLR. L.F. at 1803, 1828. The Director's construction of the appropriations does not require that the medical staff of RHS be on the payroll of RHS so long as RHS fully reimburses PPSLR. If that aspect of the Director's interpretation was wrong, PPSLR could transfer the RHS clinical staff to an RHS payroll. This is an example of why it was wrong for the trial court, having invalidated the Director's construction of the appropriations, not to have either clearly construed the terms, or to have remanded the matter to the Director with instructions to guide her in re-construing the terms, and then to have allowed Planned Parenthood an opportunity to come into compliance with the appropriations. See infra Point VI.

PPSLR also owns and leases equipment to RHS. RHS pays market prices for this equipment. L.F. at 0355, 1802, 1953-1956.

In addition, there is one local phone number for the PPSLR building.[6] L.F. at 0353, 1794, 1826. RHS reimburses PPSLR for the full cost of all outgoing long distance calls on that number, and for access to the telephone system pursuant to an expense allocation that is consistent with generally accepted accounting principles.[7] L.F. at 1801, 1826, 1936.

When a woman at one of the Planned Parenthood clinics is diagnosed as pregnant, Planned Parenthood, as required by Title X, offers her counseling and information about all of her options for proceeding with that pregnancy. L.F. at 1804, 1807, 1827, 1932. If she requests the counseling, Planned Parenthood provides her with factual and nondirective information, and endeavors to answer all questions she may have, concerning any option, including abortion, in which she expresses an interest. L.F. at 1804, 1807–08, 1827, 1932.

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[6] PPKM and CHS have separate phone numbers.

[7] A caller to the local number at the PPSLR building can be directly transferred to RHS either by selecting to do so on the automated answering system or by asking for RHS when the operator answers. L.F. at 1801-02, 1804, 1826. However, when a woman calls on the telephone and requests information about an abortion provider, PPSLR provides her with a referral list of abortion providers. L.F. at 1804, 1827.

In the course of the counseling, Planned Parenthood sometimes uses brochures to provide that information. Two such brochures are "Abortion Questions and Answers" (L.F. at 0357, 0363, 1796, 1799) and "Coping Successfully After an Abortion" (L.F. at 0363, 1799). As this Court will see upon its review of these brochures, they contain only objective and factual information designed to inform and educate.

After a woman has been counseled, if she expresses a preference for a particular option or options, Planned Parenthood, again as required by Title X, provides a referral list of providers of the services that comport with her preference(s). L.F. at 1804, 1807, 1827, 1932. They are lists of providers of the services that the woman is considering or has chosen; the woman then must choose her provider and make her own arrangements.[8]

[8] If a woman at PPKM chooses abortion and then indicates that she intends to go to CHS for her abortion, PPKM provides her at that time with a packet of information required to be given to her by Kansas law (CHS is located in Kansas). L.F. at 0363, 1799, 1808, 1932. Kansas law requires that no abortion be performed until at least 24 hours after this information is provided to a woman obtaining an abortion in Kansas. The law requires that the information include a description of the abortion procedure, the identity of the abortion provider, and that the woman sign a form acknowledging that she has been given the information. Kan. Stat. Ann. § 65-6709. Thus, the packet contains information about abortion procedures and a form for the woman to sign that contains the name and address of CHS.

Thus, a pregnant woman could leave one of Planned Parenthood's health care facilities with brochures that discuss abortion, but without brochures that discuss adoption or parenthood. L.F. at 0357, 0363, 1796, 1799. This would happen if, after counseling, the woman indicated that she intended to terminate her pregnancy, or if she indicated that this was the only information she desired. L.F. at 1808. Similarly, a woman could leave one of Planned Parenthood's health care facilities with only information about good prenatal health practices, and nothing about abortion or adoption, if she indicated that her only interest was to carry her pregnancy to term and raise a child. Id. Regardless of which options are discussed, something that is dictated by the woman's expressed choices, the materials and information provided remain objective, factual, and non-directive. They do not counsel a woman to do anything, but only about the choices that interest her; they do not market anything, but only provide factual and non-directive information; and they do not directly refer, but only provide a list of referrals consistent with her choices.

POINTS RELIED ON

POINT I

The Trial Court Erred In Concluding That The State Had The Authority To Bring The First And Second Counts In The Second Amended Petition And In Entering Judgment On The Merits Of Those Counts, Because The State Has Only The Authority Granted To The Special Assistant Attorney General By The

Attorney General, Who Has Forbidden The Special Assistant Attorney General From Making Claims Against The Director; These Counts Are Claims Against The Director And So Outside The Special Assistant Attorney General's Authority In That The Allegation That Planned Parenthood Is Ineligible For The Program Is Entirely Dependent On The Assertion That The Director's Construction Of The Undefined Terms Of The Appropriations Is Illegal.

W.A. Ross Constr. v. Chiles, 130 S.W.2d 524 (Mo. 1939)

McClellan v. Highland Sales & Inv. Co., 426 S.W.2d 74 (Mo. 1967)

Oklahoma Turnpike Auth. v. Bruner, 259 F.3d 1236 (10th Cir. 2001)

Krangel v. Crown, 791 F. Supp. 1436 (S.D. Cal. 1992)

Black's Law Dictionary (6th ed. 1990)

Webster's Seventh New Collegiate Dictionary (1967)

Mo. Rev. Stat. § 527.110

Mo. Rule 87.04

POINT II

The Trial Court Erred In Concluding That The First And Second Counts In The Second Amended Petition Are Justiciable And In Entering Judgment On Those Counts For Three Reasons: First, Because The State Does Not Have Standing To Challenge An Executive Official's Construction Of The Undefined Terms Of A Statute That The Official Is Authorized To Implement, In That Such An Action By

A State Official Does Not Cause Concrete Injury To The State Or Implicate The State's General Welfare, Obligations Or Functioning. Second, Because The Governor, Not The Attorney General Or A Special Assistant Attorney General, Has The Responsibility Under The Missouri Constitution To See To The Faithful Execution Of The Laws; Entertaining This Action On The Merits Would Violate This Principle In That The Governor's Delegee, The Director, Has Determined How The Appropriations Are To Be Interpreted And The Attorney General Has No Authority To Countermand That Determination. Third, Because Claims In The Name Of The State Must Be Made By The Attorney General Or A Delegee Who Is Accountable To Him; The Claims In This Case Violate That Principle In That They Are Made By A Special Assistant Attorney General Who Is Adverse And Not Accountable To The Attorney General.

Allen v. Wright, 468 U.S. 737 (1984)

Ours v. City of Rolla, 965 S.W.2d 343 (Mo. Ct. App. 1998)

State ex inf. McKittrick v. Murphy, 148 S.W.2d 527 (Mo. 1941)

Missouri Coalition for the Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125 (Mo. banc 1997)

Mo. Const. art. IV, § 2

Mo. Const. art. V, § 14

U.S. Const. art. III

Mo. Rev. Stat. § 27.060

POINT III

The Trial Court Erred In Entering Its Judgment Declaring That The Appropriations Do Not Violate The Constitution Of Missouri, Because Under Article III, Section 23, Of The Constitution The Sole Permissible Purpose Of An Appropriations Bill Is To Set Aside Moneys For Specified Purposes, So That An Appropriation Bill May Not Contain Substantive Legislation; These Appropriation Bills Do Contain Substantive Legislation In That They Change Existing Law And Create New Regulations Governing The Activities (Not Funded By The Appropriations) Of Entities Receiving The Funds Appropriated.

Hueller v. Thompson, 289 S.W. 338 (Mo. banc 1926)

State ex rel. Davis v. Smith, 75 S.W.2d 828 (Mo. 1934)

State ex rel. Gaines v. Canada, 113 S.W.2d 783 (Mo. banc 1937)

Webster v. Reproductive Health Servs., 492 U.S. 490 (1989)

Mo. Const. art. III, § 23

Mo. Rev. Stat. § 188.205

POINT IV

The Trial Court Erred In Concluding That The Director's Construction Of Undefined Terms In The Appropriations Was Illegal And That Planned Parenthood Was Not Eligible And Should Be Enjoined From Participating In The Program, Because The Construction Of Terms In A Statute By The State Official Charged With Its Implementation Is Entitled To Deference And Should Be Sustained Unless

It Is Shown That The Official's Construction Is Not Reasonably Related To The Statute's Purpose; The Director's Construction Here Should Be Sustained Under This Standard In That The Director's Construction Of The Terms At Issue Reasonably Implements The Permissible Intent Of The Legislature That State Funds Not Subsidize The Provision Of Abortion Services While Avoiding Constitutional Problems And Being Consistent With Other Statutes *In Pari Materia*

Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193 (Mo. 1972)

State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876 (Mo. 1934)

Romans v. Director of Revenue, 783 S.W.2d 894 (Mo. banc 1990)

Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Dempsey, 167 F.3d 458 (8th Cir. 1999)

Mo. Rev. Stat. § 349.035

POINT V

The Trial Court Erred In Construing The Appropriations' Prohibitions Against "Counseling Patients To Have Abortions," "Distributing Marketing Materials About Abortion Services," And Providing "Direct Referrals" To Abortion Providers To Include Planned Parenthood's Practices, Because The Trial Court's Construction Of Those Terms Was Unreasonable, In That Those Terms Cannot Reasonably Be Construed To Include Practices Revealed By The Record: The Provision Upon A Patient's Request Of Factual, Non-Directive Information About Abortion, And A List Of Providers Of Abortion Services.

Sitzes v. Raidt, 335 S.W.2d 690 (Mo. Ct. App. 1960)

House Bill 1110, § 10.710 (2000)

POINT VI

The Trial Court Erred In Voiding The Director's Construction Of The Appropriations And Permanently Enjoining Planned Parenthood From Participating In The Program, Because After Voiding An Executive's Construction Of A Statute, A Court Should Either Construe The Statute Or Remand To The Executive With Instructions That She Do So, And Should Allow The Parties Reasonable Time To Achieve Compliance With The New Construction; The Trial Court's Judgment Is Deficient In That It Does Not Set Forth The Proper Construction Of The Appropriations, Or Remand To The Director For Her To Do So, And Does Not Allow Planned Parenthood A Reasonable Opportunity To Comply With A New Construction Of The Appropriations.

Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir. 1988)

Chemical Waste Mgmt. v. EPA, 976 F.2d 2 (D.C. Cir. 1992)

AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366 (1999)

Chicago & N.W. Transp. Co. v. United States, 582 F.2d 1043 (7th Cir. 1978)

Mo. Rev. Stat. § 536.019

Mo. Rev. Stat. § 536.028(4)

5 U.S.C. § 553(d)

POINT VII

The Trial Court Erred In Ordering Planned Parenthood To Repay Funds Already Received, Because The Director Had Legal Authority To Enter Into The Contracts, And Planned Parenthood Was Entitled To Rely On Her Construction Of The Statutory Terms, In That The Director Is The Executive Official Responsible For Implementing The Family Planning Program And Planned Parenthood Is Only Charged With The Duty Of Being Sure That The Person Contracting On Behalf Of The State Is Authorized To Do So.

Aetna Ins. Co. v. O'Malley, 124 S.W.2d 1164 (Mo. 1938)

POINT VIII

The Trial Court Erred In Declaring The Appropriations Constitutional Under The United States Constitution, Because The United States Supreme Court Has Expressed Confidence That The State Courts Will Not Address Claims Reserved By A Federal Court When That Court Abstains; The Federal Constitutional Issues Were Reserved In That The United States District Court Issued An Abstention Order In Planned Parenthood v. Dempsey, No. 99-4145-CV-C-5 (W.D. Mo. filed June 22, 1999), In Which That Court Reserved The Issue Of The Constitutionality Of The Appropriations Under The United States Constitution For Resolution In Federal Court.

England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411 (1964)

ARGUMENT

STANDARD OF REVIEW

The standard for review of a summary judgment is *de novo*. ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). This standard applies to all of the points raised by Planned Parenthood. Further, on review of summary judgment, this Court views the record in the light most favorable to the party against whom summary judgment has been granted, and accords that party all reasonable inferences that may be drawn from the evidence. Heins Implement Co. v. Missouri Highway and Transp. Comm'n, 859 S.W.2d 681, 693 (Mo. banc 1993).

POINT I

The Trial Court Erred In Concluding That The State Had The Authority To Bring The First And Second Counts In The Second Amended Petition And In Entering Judgment On The Merits Of Those Counts, Because The State Has Only The Authority Granted To The Special Assistant Attorney General By The Attorney General, Who Has Forbidden The Special Assistant Attorney General From Making Claims Against The Director; These Counts Are Claims Against The Director And So Outside The Special Assistant Attorney General's Authority In That The Allegation That Planned Parenthood Is Ineligible For The Program Is Entirely Dependent On The Assertion That The Director's Construction Of The Undefined Terms Of The Appropriations Is Illegal.

The State's claim that Planned Parenthood is not eligible for the program is premised entirely upon its claim that the Director's construction of the appropriations' undefined terms is illegal. Although the Second Amended Petition does not assert this "illegal construction" claim directly (as did both the State's Amended Petition and its proposed intervener's complaint in federal court), nonetheless that claim—that the Director illegally construed the statute—is at the heart of the State's case.

Yet, in the Attorney General's post-remand letter to the SAAG, responding to this Court's direction that he "clearly and specifically" delineate the SAAG's authority, the SAAG is admonished that he is "not authorized to file, maintain, or pursue any action or claim of any sort against the Director. . ." P.R.L.F. at 51; A24. Accordingly, the State lacks the authority to pursue First and Second Counts of its Second Amended Petition because those Counts are based on the State's claim that the Director illegally construed the appropriations.

Planned Parenthood moved to dismiss in the trial court on these grounds. The trial court denied the motion, stating only that "the State has the authority to pursue the claims in its Second Amended Petition against [Planned Parenthood]." P.R.L.F. at 359–60; A28-29. This holding misses the point. The question is not whether the State has the authority to pursue its claims against Planned Parenthood. The question is whether its central claim—that the construction of the appropriations is illegal—is a claim against the Director. The answer to that question can only be "yes." Therefore, the judgment should be vacated and the First and Second Counts of the Second Amended Petition dismissed because the State lacks the authority to pursue the "illegal construction" claim.

This Court has consistently held that it is the actual substance of an action, not how it is or is not plead, that is determinative. In re Doe Run Lead Co., 223 S.W. 600, 608 (Mo. 1920) ("the nature of the issues determines the character of the action"); W.A. Ross Constr. v. Chiles, 130 S.W.2d 524, 528 (Mo. 1939) ("The case is whatever the pleadings and the facts make it, regardless of what name plaintiff gave it."); McClellan v. Highland Sales & Inv. Co., 426 S.W.2d 74, 77 (Mo. 1967), quoting State v. Consol. Sch. Dist. No. 4, 417 S.W.2d 657, 659 (Mo. banc 1967) ("'[T]he character of a cause of action is determined from the facts stated in the petition and not by the prayer or name given the action by the pleader . . . .'").

Thus, it does not matter that the State, after having been limited by the Attorney General, deleted its explicitly stated claim that the Director had construed the appropriation illegally. What matters is the substance of the dispute, not how it is disguised by clever pleading. Here, the substance of the dispute is whether the Director's construction of the appropriations is legal: if her construction is legal, then Planned Parenthood is eligible for the program; if her construction is illegal, then, depending on the correct construction, Planned Parenthood may not be eligible.

The State's position, that the Director's construction is illegal, is surely a claim asserted by the State even though it is not explicitly plead. It meets the definition of "claim" in Black's Law Dictionary: "To demand as one's own or as one's right; to assert; to urge; to insist. A cause of action. Means by or through which claimant obtains possession or enjoyment of privilege or thing. . . " Black's Law Dictionary 247 (6th ed. 1990). It meets the definition of a "claim" for purposes of *res judicata* analysis under

federal law: "Every legal theory pertaining to one transaction is part of a single claim." United States v. County of Cook, 167 F.3d 381 (7th Cir. 1999), cert. denied, 528 U.S. 1019 (1999). It meets the definition of "claim" for purposes of Federal Rule of Civil Procedure 54(b): "factually or legally connected elements of a case." Buckley v. Fitzsimmons, 919 F.2d 1230, 1237 (7th Cir. 1990), vacated on other grounds, 502 U.S. 802 (1991); Oklahoma Turnpike Auth. v. Bruner, 259 F.3d 1236, 1242 (10th Cir. 2001).

Moreover, it is surely a claim "against" the Director. Again, it meets the definition of "against" in Black's Law Dictionary: "Adverse to; contrary. Signifies discord or conflict; opposed to; without the consent of; in conflict with…." Black's Law Dictionary 61. See also State v. Williams, 854 P.2d 131, 134 (Ariz. 1993), citing Webster's Seventh New Collegiate Dictionary 17 (1967) ("against" means directly opposite, in opposition, or hostility to).

In Krangel v. Crown, 791 F. Supp. 1436 (S.D. Cal. 1992), the court, in order to resolve a motion to remand to state court a removed shareholders' derivative action, considered whether the shareholders' complaint stated a claim "against" the corporation even though the complaint did not explicitly assert claims against the corporation. The court focused on "the nature of the dispute," and the fact that the corporate management was defending its actions, and concluded that the shareholders' claim was "against" the corporation because there was "antagonism" between the shareholder and the corporate

management.[9] Id. at 1438-39. See also Smith v. Sperling, 354 U.S. 91, 97 (1957) (determine whether corporation is properly a defendant by ascertaining if there is a "real collision of issues. . . This is a practical not a mechanical determination…"); In re Continental Airlines Corp., 50 B.R. 342, 351 (S.D. Tex. 1985), aff'd, 790 F.2d 35 (5th Cir. 1986) (to extent plaintiff debtor "ha[s] an interest 'adversary'" to defendant-intervener, proceeding is "against" plaintiff debtor for purposes of determining whether proceedings should be stayed as action against debtor).

Here, as well, there is a real collision and antagonism between the State and the Director. The dispute centers on an action of the Director: her construction of the undefined terms in the appropriations. The State is claiming her construction is illegal. She is defending it.

Given the history of this litigation, it is untenable for the State to assert that it is not making a claim against the Director. In the State's original (amended) petition,

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[9] The court described the relationship among the parties in a shareholder's derivative action in terms that seem equally applicable here. It noted that the corporation's ultimate interest may be the same as that of the shareholders, but that the corporation was under control that was antagonistic to the shareholders and made to act in a way that the shareholders believed detrimental to their rights. Krangel, 791 F. Supp. at 1438-39. Likewise here, the State's and the Department's ultimate interest may be the same, but the Department is under the control of the Director who has acted in a way that the State believes detrimental to its rights.

"Count II" was a claim that the Director's construction of the appropriation was illegal. L.F. at 0123–24. The Director, however, was not named as a party because the SAAG's letter of appointment, as amended, stated that he was not authorized to file litigation against the Director. S.L.F. at 134. The claim that the Director's construction was illegal made her a necessary party.[10] She was added as a Defendant, and the State's Amended Petition set forth two claims (Counts II and V) against the Director asserting that her construction of the appropriation was illegal. L.F. at 0123–24, 0127–28. In this Court, on the first appeal from the trial court, the SAAG defended his authority to make these claims which he characterized as "Claims Against the Director." See Brief of Respondent The State of Missouri, July, 20, 2000 at 41–42 (Supreme Court No. SC 83778).

Similarly, in Planned Parenthood's federal court case against the Director, the SAAG repeatedly acknowledged that the State's assertion that the Director had illegally construed the appropriation was a claim against the Director. With its intervention motion, the State filed a proposed intervenor's answer that asserted three cross-claims, all

[10] See Mo. Rev. Stat. § 527.110 and Mo. Rule 87.04; Eastern Missouri Laborer's Dist. Council v. City of St. Louis, 951 S.W.2d 654, 657 (Mo. Ct. App. 1997); State of Missouri ex rel. Nelson v. City of Berkeley, 991 S.W.2d 747, 749 (Mo. Ct. App. 1999); Lake Sherwood Estates v. Continental Bank & Trust, 677 S.W.2d 372, 375 (Mo. Ct. App. 1984). See also Leber v. Canal Zone Central Labor Union, 383 F.2d 110, 114-15 (5th Cir. 1967).

against the Director. S.L.F. at 48–54. One of them sought a declaratory judgment—against the Director—that the Director's construction of the appropriation was illegal, and one sought an injunction—against the Director—prohibiting the Director from implementing the appropriation according to her construction, or in any manner inconsistent with the construction advocated by the State. S.L.F. at 52–54. In its Intervenor's Suggestions in support of its motion, the State repeated that it was making "Cross-Claim[s] against the Director," and characterized them as follows:

> . . .[T]he State's Cross-Claim against the Director claims that the Director has interpreted [the statute]. . . in a manner that is contrary to the express language and rationale of the appropriation, in a manner that is contrary to the legislative intent of the appropriation, and in a manner that is contrary to the will of the people of the State of Missouri as expressed through their elected representatives. The State's Cross-Claim against the Director also claims that the Director has exceeded her statutory authority.

S.L.F at 20.

The State has consistently recognized, as it must, that its assertion that the Director has illegally construed the appropriation is a claim against the Director. It cannot now escape that reality by the transparent ruse of basing its Second Amended Petition entirely on the same legal assertion, but not stating it explicitly. The State, however, is not authorized to make that claim, or any claim, against the Director. Therefore, the judgment of the trial court should be vacated and reversed, and the First and Second Counts of the Second Amended Petition should be dismissed.

POINT II

The Trial Court Erred In Concluding That The First And Second Counts In The Second Amended Petition Are Justiciable And In Entering Judgment On Those Counts For Three Reasons: First, Because The State Does Not Have Standing To Challenge An Executive Official's Construction Of The Undefined Terms Of A Statute That The Official Is Authorized To Implement, In That Such An Action By A State Official Does Not Cause Concrete Injury To The State Or Implicate The State's General Welfare, Obligations Or Functioning. Second, Because The Governor, Not The Attorney General Or A Special Assistant Attorney General, Has The Responsibility Under The Missouri Constitution To See To The Faithful Execution Of The Laws; Entertaining This Action On The Merits Would Violate This Principle In That The Governor's Delegee, The Director, Has Determined How The Appropriations Are To Be Interpreted And The Attorney General Has No Authority To Countermand That Determination. Third, Because Claims In The Name Of The State Must Be Made By The Attorney General Or A Delegee Who Is Accountable To Him; The Claims In This Case Violate That Principle In That They Are Made By A Special Assistant Attorney General Who Is Adverse And Not Accountable To The Attorney General.

Planned Parenthood believes the circumstances presented here are unprecedented in Missouri jurisprudence. The "State" has commenced litigation that challenges an

executive department official's (the Director's) construction of the undefined terms in an appropriation that she is responsible for implementing. The Director is a named Defendant in the litigation. She is represented by the Attorney General of Missouri who, before authorizing any litigation on behalf of the "State," advised the Director that her construction of the appropriation was legal. S.L.F. at 131. From the inception of this litigation, the Director has opposed the "State," and defended her construction of the appropriation. L.F. at 327–339, 1310–1357, 1729–1736; P.R.L.F. at 230–244. She will be bound by the judgment.

This is a non-justiciable controversy. Planned Parenthood has found no precedent under Missouri law for the State to challenge an executive department official's construction of the undefined terms of a statute she is charged with administering. Nor is there precedent that suggests that, where an executive construes a statute that she is responsible for implementing, a disagreement about that construction is an "injury" to the State.

To accord the State standing under these circumstances would undermine the provisions of Article IV, Section 2, of the Missouri Constitution. That provision accords to the Governor the exclusive responsibility to ensure that the laws are faithfully executed. Mo. Const. art. IV, § 2. This Court has a strong history of preventing one part of state government from intruding upon responsibilities clearly allocated to another part of the government. Given this history, the explicit allocation by the Constitution to the Governor of the responsibility to implement the state's laws, and the fact that this dispute

is plainly an intra-governmental policy dispute[11] over the proper administration of a statute, this Court should conclude that this is a non-justiciable controversy.

A. The State Has Neither The Injury Nor The Authority To Pursue Its Claims.

The constitutional requirement of an injury sufficient to create a justiciable case or controversy is found in Article V, §14, of the Missouri Constitution. This Court has held that provision to be the "Missouri analog" to the federal case and controversy requirement rooted in Article III of the federal constitution; and this Court has held that the same standing and justiciability requirements that are found in the federal context "exist under Missouri law." Harrison v. Monroe County, 716 S.W.2d 263, 266 (Mo. banc 1986).

Article III of the federal Constitution limits judicial authority to "cases" and "controversies." U.S. Const. art. III. Several doctrines of justiciability have evolved to implement that requirement. The Supreme Court has explained that these requirements

[11] See, e.g., S.L.F. at 71 (original letter from Attorney General appointing SAAG: "The Senate Administration Committee has asked that you be appointed as a special assistant attorney general to defend the constitutionality of the statute. The legislature is not currently a party to this litigation."); S.L.F. at 75–76 (letter to SAAG from Chairman of Senate Administration Committee directing SAAG not to pursue claims against the Director because Chairman did not want to set precedent of tax dollars being "used to pursue a political agenda or to fund litigation between the various branches of Missouri government.").

are "'founded in concern about the proper—and properly limited—role of the courts in a democratic society.'" Allen v. Wright, 468 U.S. 737, 750 (1984), (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). These requirements protect the courts from becoming "'virtually continuing monitors of the wisdom and soundness of Executive action.'" Allen, 468 U.S. at 760 (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)). "'[S]uch a role is appropriate for the Congress acting through its committees and the "power of the purse. . .'" Id.

The standing doctrine "is perhaps the most important of these doctrines." Allen, 468 U.S. at 750; Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997). In discussing standing, the Supreme Court of the United States has "repeatedly held that an asserted right to have the Government act in accordance with law" is not sufficient to establish standing. Allen, 468 U.S. at 754. This is because such a claim is a "generalized grievance," where the injury is "undifferentiated and 'common to all members of the public.'" United States v. Richardson, 418 U.S. 166, 176-77 (1974) (quoting Ex Parte Levitt, 302 U.S. 633, 634 (1937)). See also Arizonans for Official English, 520 U.S. at 64 ("An interest shared generally with the public at large in the proper application of the Constitution and laws will not do."). This doctrine is so firmly established that even Congressional enactments that explicitly attempt to establish standing are voided if they attempt to "convert the undifferentiated public interest in executive officers' compliance with the law" into an interest sufficient to confer standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992).

Missouri courts have enunciated the same requirement that an injury must differ from that of the public generally in order to create standing. See, e.g., Ours v. City of Rolla, 965 S.W.2d 343, 344 (Mo. Ct. App. 1998) ("Generally, an individual does not have standing to seek redress of a public wrong, or of a breach of public duty, if such individual's interest does not differ from that of the public generally, even though the complainant's loss is greater in degree than that of other members of the public." (quoting Hinton v. City of St. Joseph, 889 S.W.2d 854, 859 (Mo. Ct. App. 1994))); Missouri Growth Ass'n v. Metropolitan St. Louis Sewer Dist., 941 S.W.2d 615, 622 (Mo. Ct. App. 1997) (requiring "'a direct, specific, legally cognizable interest distinct from the interests of the general public'" (quoting Citizens for Safe Waste Management v. St. Louis County, 810 S.W.2d 635, 639 (Mo. Ct. App. 1991))).

This Court has held that the concrete injury requirement applies as well to the State even when it seeks to sue a component of state government. In State ex rel. McKittrick v. Missouri Public Service Commission, 175 S.W.2d 857, 862 (1943), this Court held that Mo. Rev. Stat. §27.060, which authorizes the Attorney General to file litigation necessary to "protect the rights and interests of the state," does not abrogate the requirement that the State demonstrate the sort of concrete injury necessary to establish standing. Thus, in McKittrick, the State did not have standing to challenge a Public Service Commission (PSC) order because it could not allege either the same kind of concrete injury as would be required of a private litigant, or an injury "definitely affecting the general welfare of the State or its obligations and functioning." 175 S.W.2d at 862.

That type of injury is absent here. The State's claimed "injury" appears to be that it has an "interest[s] as to the family planning program," P.R.L.F. at 14, and a dispute with the Director over how she has construed undefined terms in the appropriations. First, the record is clear that the Attorney General—the official empowered to protect the legal rights of the State—advised the Director that her construction of the appropriation was legal.[12] S.L.F. at 131. This makes untenable the assertion that the State is injured by

[12] Several state supreme courts have addressed the question of the authority of the state attorney general to commence or intervene in litigation in a position adverse to a state agency, where the attorney general either has provided legal advice to the agency on the matter in question, or is under a legal obligation to represent the agency. Many of those courts, after reviewing the statutes and constitution of their respective states, have concluded that where the attorney general has provided relevant counsel or representation, or where he is under a duty to do so, he may not commence, or intervene in, litigation as an adversary to the agency. See, e.g., Arizona State Land Department v. McFate, 348 P.2d 912, 918 (Ariz. 1960); People ex rel. Deukmejian v. Brown, 624 P.2d 1206, 1209 (Cal. 1981); City of York v. Pennsylvania Public Utility Commission, 295 A.2d 825, 833 (Penn. 1972); Teleco, Inc. v. Corporation Commission of State of Oklahoma, 649 P.2d 772, 774 (Okla. 1982) (refusing to allow Attorney General to intervene in own name to oppose state agency). But see Superintendent of Insurance v. Attorney General, 558 A.2d 1197, 1200 (Maine 1989); State ex rel. Allain v. Mississippi Public Service Comm., 418 S.2d 779, 784 (Miss. 1982).

the Director's construction. Second, concerns that the laws be implemented and appropriations spent in accord with the SAAG's view of the Legislature's intent are a policy dispute, not a concrete injury sufficient to establish standing. See Director, Office of Workers' Comp. v. Newport News Shipbuilding, 514 U.S. 122, 128-129 (1995) (injury to a government agency "in its capacity as a member of the market group that [a] statute was meant to protect" would support standing, but agency's general concerns over the interpretation or implementation of legislation are insufficient: acknowledging such an interest would put courts into business of deciding intra-branch and intra-agency policy disputes—a role that would be most inappropriate.").

In addition to Mo. Rev. Stat. §27.060, the Attorney General has the authority to commence litigation in the name of the State in *quo warranto* proceedings under chapter 531 and in *mandamus* proceedings under chapter 529. Neither of those statutory authorizations is applicable here. *Quo warranto* is limited to testing the authority of an official exercise of power. See, e.g., State ex inf. McKittrick v. Murphy, 148 S.W.2d 527, 530 (Mo. 1941) (*Quo warranto* "is solely to prevent . . . . persons purporting to act as such from usurping a power which they do not have."). *Mandamus* is limited to enforcing mandatory duties on public officials. State ex rel. Taylor v. Wade, 231 S.W.2d 179, 182 (Mo. 1950) (Attorney General is proper party to bring *mandamus* action for the state which seeks enforcement of duties).

Here, there is no question as to whether the Director had legal authority to implement the program; there is only a question as to the legality of her construction of certain undefined terms. Thus, *quo warranto* is inapplicable. State ex inf. McKittrick,

supra, 148 S.W.2d at 530 (Mo. 1941) (*Quo warranto* cannot "be used to prevent an improper exercise of power lawfully possessed.). See also State ex inf. Walsh v. Thatcher, 102 S.W.2d 937, 938 (Mo. 1937) (neither the question of conflict of statutes nor the question of the constitutionality of a law can be determined in *quo warranto*). Nor is *mandamus* applicable because this dispute does not involve a ministerial duty. State ex rel. Phillip v. Public Sch. Ret. Sys., 262 S.W.2d 569, 573–74 (Mo. banc 1953); State ex rel Igoe v. Bradford, 611 S.W.2d 343, 347 (Mo. Ct. App. 1980) (mandamus not used to resolve issues centered on an ambiguous statute).

Thus, while the State may have standing to sue an executive official in certain circumstances—where there is a legally cognizable concrete injury to the State, or where an executive official is acting outside the scope of her authority or is failing to perform a ministerial duty—it does not have a boundless commission that creates standing for it to do what it seeks here: challenge an executive's construction of undefined terms in a statute that she is authorized to implement.

B. This Controversy Is Also Not Justiciable Because State Standing Would Contravene Article IV, Section 2, Of The Missouri Constitution And A Judicial History Of Respect For The Allocation Of Responsibilities Within The Government.

Article IV, Section 2, of the Missouri Constitution states that the Governor, "shall take care that the laws are . . . faithfully executed." Mo. Const. art. IV, § 2. Granting to the Attorney General, in the name of the State, the authority to commence litigation to

challenge an executive official's construction of the undefined terms of a statute would erode that authority.

In at least three different contexts, this Court has recognized the importance of protecting the allocation of responsibilities within state government. First, in two recent separation of powers cases, this Court voided statutes that would have eroded responsibilities specifically allocated to the executive branch. Missouri Coalition for the Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125, 134 (Mo. banc 1997) (invalidating legislation that empowered a committee of legislators to prevent enforcement of executive agency rules); State Auditor v. Joint Committee on Legislative Research, 956 S.W.2d 228 (Mo. banc 1997) (enjoining a legislative committee from post-auditing an executive agency). Second, in McKittrick v. Missouri Public Service Commission, when this Court rejected the contention that the State had standing to challenge a PSC ruling in order to protect the public interest, this Court noted that the PSC was created to protect the public interest, and characterized what the State sought as "officious intermeddling." 175 S.W.2d at 862. Third, this Court has held that it will not hear "political questions." State on Info. of Danforth v. Banks, 454 S.W.2d 498 (Mo. banc 1970). It has identified "'a textually demonstrable constitutional commitment of the issue to a coordinate political department'" Id. at 500, quoting Baker v. Carr, 369 U.S. 186, 217 (1962), as a key factor in identifying a when an issue is a political question.

Moreover, in the "Joint Committee" cases, this Court noted that the Legislature has a variety of powers for monitoring executive branch implementation. Missouri Coalition, 948 S.W.2d at 133–34 ("Promulgation of rules and regulations is an executive

function. . . [There is] no legislative involvement in the rulemaking process. . . [The Legislature] may, of course, attempt to control the executive branch by passing amendatory or supplemental legislation. . . or, by the power of appropriation. . . hold committee hearings, conduct investigations, or request information from the executive branch."); State Auditor, 956 S.W.2d at 233 (same). The U.S. Supreme Court has made the same observation about the federal system. Allen, 468 U.S. at 760 (quoting Laird 408 U.S. at 15) ("'[S]uch a role is appropriate for the Congress acting through its committees and the "power of the purse. . .'").

All of these cases support the conclusion that this is a non-justiciable controversy. The Constitution allocates to the Governor the responsibility to ensure that the laws are faithfully executed. According standing to the State to challenge how the Governor (through the Director) implements an appropriation erodes the Governor's constitutional authority and opens the door for what this Court has labeled "officious intermeddling." McKittrick v. Missouri Pub. Serv. Comm'n, 175 S.W.2d at 862. The Legislature has well-recognized tools at its disposal for addressing what it perceives to be an improper implementation of its appropriations. This Court should hold this to be a non-justiciable controversy, and leave to the Legislature the remedies this Court has identified for resolving what is plainly a policy dispute.

C. If The State Has Standing, Then The State Must Be Represented By The Attorney General, Not His Adversary.

If this Court concludes that the State has standing, then this Court should also hold that in cases such as this, where the State is challenging an executive's construction of a

state statute, only the Attorney General can represent the State. Cf., State v. Homesteaders Life, 16 F. Supp. 69, 75 (W.D. Mo. 1936) (state can become a party only at instance of Attorney General); State ex rel. Igoe v. Bradford, 611 S.W.2d at 347 ("It is for the Attorney General to decide where and how to litigate issues involving public rights and duties. . ."). [13]

When the State sues, someone must be empowered to make decisions about what positions to take concerning the matter in dispute. That is the role of the Attorney General. A subordinate could similarly make those decisions, so long as the subordinate was directly accountable to the Attorney General. But the Attorney General cannot

[13] Planned Parenthood does not question the power of the Attorney General to appoint deputies or special assistants to represent different state agencies when a conflict arises between those agencies, and one suffers or is at risk of suffering a classic form of concrete injury that would establish standing if that agency were outside of government. See, e.g., Commonwealth v. Wilkinsburg Penn Joint Water Auth., 740 A.2d 322 (Pa. 1999) (upheld right of agency to sue other agency for money damages); Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Information Comm'n, 387 A.2d 533, 537–39 (Conn. 1978) (allowing Attorney General to represent the two adverse commissions). This case is different. In cases where one executive agency is injured by another's actions, the agency heads can make litigation decisions. Here, the question is: who "speaks" for the State. It must be the Attorney General, and that is not possible when he delegates that responsibility to someone adverse and unaccountable to him.

delegate his role to someone not accountable to him. Such a delegation would give unique and substantial powers to a private citizen who is neither chosen by nor accountable to the Missouri electorate. This, in turn, results in a private citizen being empowered to take positions in the name of the State with no institutional assurance that these are, in fact, the positions of the State, as opposed to the positions of an advocate with a mission not necessarily shared by the State.

This litigation illustrates those fears come-to-life. The SAAG sufficiently overstepped the limits of his first appointment to draw reprimands both from the Attorney General and the Legislature, which the Attorney General had originally identified as the SAAG's client. S.L.F at 73, 75–76. Then, a carefully amended re-appointment letter admonished explicitly that the SAAG's appointment was "limited" to pursuing an action against Planned Parenthood, and that the SAAG's appointment "did not authorize" filing an action against the Director. S.L.F. at 134. Yet, the SAAG filed an action asserting claims against the Director (that her construction of the statute was improper). L.F. at 1–28. He sought to avoid the Attorney General's instructions by not naming the Director as a party and arguing later, after the Director was added as an indispensable party, that while he was precluded from filing an action against the Director, he was not precluded from "asserting claims against the Director. . ." Brief of Respondent The State of Missouri, July 20, 2000, at 41 (Supreme Court No. SC82226). After remand by this Court, the Attorney General wrote to the SAAG that he was "not authorized to file, maintain, or pursue any action or claim of any sort against the [Director]." P.R.L.F. at

51; A24. Nonetheless, the State's Second Amended Petition is entirely premised on the assertion that the Director has illegally construed the appropriations. P.R.L.F. at 14–55.

Moreover, the SAAG asserts extreme positions that are not necessarily positions that the State speaking through the Attorney General would assert. For example, in the first appeal to this Court, to support his State standing argument, the SAAG cited precedent that suggested that the Director's construction of the statute was analogous to a conspiracy to defraud state government, Brief of Respondent The State of Missouri, July 20, 2000, at 33 (Supreme Court Case No. SC82226), even though that is clearly not the case. Likewise, his assertions of the proper construction of the appropriations' terms are extreme and raise potential constitutional problems. Yet his position is not shared by the Attorney General, who is adverse to him in this litigation, and who is the only person authorized by the voters of Missouri to take a position on behalf of the State.

Both the Supreme Courts of Mississippi and Rhode Island have recognized that where the Attorney General acts in the name of the State, he must not delegate his role to someone not accountable to him. In their decisions upholding the standing of their states to challenge rate-setting decisions, both opine that the Attorneys General should represent the State and appoint special or deputy assistants to represent the commission or authority whose decision is being challenged. State v. Mississippi Public Service Comm'n, 418 S.2d at 784 and Providence Gas Co. v. Burke, 419 A.2d 263, 270-71 (R.I. 1980).

This Court should rule that the State cannot have standing to challenge an executive official's construction of undefined terms in a statute that she is responsible for implementing and enforcing. That would mean that this controversy is non-justiciable,

and the trial court judgment should be vacated and the First and Second Counts of the Second Amended Petition dismissed.

Alternatively, if this Court should determine that the State could have standing in such a controversy, then this Court should rule that the State must be represented by the Attorney General, and that the Attorney General cannot be the adversary of the State. Then, the trial court judgment should be vacated and the petition dismissed without prejudice to the Attorney General commencing litigation on behalf of the State.

POINT III

The Trial Court Erred In Entering Its Judgment Declaring That The Appropriations Do Not Violate The Constitution Of Missouri, Because Under Article III, Section 23, Of The Constitution The Sole Permissible Purpose Of An Appropriations Bill Is To Set Aside Moneys For Specified Purposes, So That An Appropriation Bill May Not Contain Substantive Legislation; These Appropriation Bills Do Contain Substantive Legislation In That They Change Existing Law And Create New Regulations Governing The Activities (Not Funded By The Appropriations) Of Entities Receiving The Funds Appropriated.

Article III, Section 23, of the Missouri Constitution provides:

> No bill shall contain more than one subject which shall be clearly expressed in its title, except . . . general appropriation bills, which may embrace the various subject and accounts for which moneys are appropriated.

Mo. Const. art. III, § 23.

This Court long ago explained that the purpose of this provision is to prevent the Legislature from proposing "all sorts of ill conceived, questionable, if not vicious, legislation . . . with the threat . . . that, if not assented to and passed, the appropriations would be defeated." Hueller v. Thompson, 289 S.W. 338, 341 (Mo. banc 1926). Thus the rule in Missouri is that:

> An appropriation bill is just what the terminology imports, and no more. Its sole purpose is to set aside moneys for specified purposes, and the lawmaker is not directed to expect or look for anything else in an appropriation bill except appropriations . . . .

Id. at 340-41. Substantive legislation is not permitted in appropriations. See, e.g., State ex rel. Davis v. Smith, 75 S.W.2d 828, 830 (Mo. 1934) ("[t]here is no doubt but what the amendment of a general statute . . . and the mere appropriation of money are two entirely different and separate subjects"); State ex rel. Gaines v. Canada, 113 S.W.2d 783, 790 (Mo. banc 1937), rev'd on other grounds, 305 U.S. 337 (1938) ("[l]egislation of a general character cannot be included in an appropriation bill" pursuant to Article III, Section 23); Hueller, 289 S.W. at 340 ("to inject general legislation of any sort into an appropriation act is repugnant to [Article III, Section 23 of] the Constitution"). This rule is to be "strictly followed." Id. at 341.[14]

[14] This is also the law in most other states. See, e.g., Dodge v. Department of Soc. Servs., 657 P.2d 969, 975 (Colo. Ct. App. 1982) ("sole purpose of [a general appropriations bill] is to meet charges already created against the public funds by affirmative acts of the

The appropriations at issue here make a mockery of this rule. In addition to stating the amount and the account of the appropriations, they legislate the following:

- They not only enumerate the services to be provided with the appropriated funds, they legislate definitions of some of those services.
- They enumerate services that may not be directly or indirectly subsidized by the appropriated funds, and legislates a definition of one of those services.
- They specify what services may, and may not, be provided by an entity that receives the appropriated funds, regardless of the source of funds used to pay for those services.

General Assembly;" programs are to be separately authorized and specifically detailed in other bills); Washington State Legislature v. State, 985 P.2d 353, 362 (Wash. 1999) (appropriations bill "cannot add restrictions to public assistance eligibility;" "proper legislative procedure is to enact separate, independent, properly titled legislation").

Similarly, Congress maintains a strict distinction between "legislation" and "appropriation," and the rules of both Houses "prohibit 'legislation' from being added to an appropriation bill." Andrus v. Sierra Club, 442 U.S. 347, 359-60 (1979). (distinction is necessary "'to assure that program and financial matters are considered independently of one another.'" Id. at 361). See also Tennessee Valley Auth. v. Hill, 437 U.S. 153, 190 (1978) (appropriations "have the limited and specific purpose of providing funds for authorized programs").

- They create an exception to these restrictions for recipients of Title X funds.
- They create a second exception to these restrictions for entities that comply with an unprecedented and elaborate set of rules that regulate in minute detail the "relationship" between a recipient and a provider of abortion services.

The issue here is not whether these restrictions are "wise" or "fair." The issue is whether they go beyond "set[ting] aside moneys for specified purposes," Hueller, 289 S.W. at 340, and amount to substantive legislation. Especially when the rule against substantive legislation in an appropriation is "strictly followed," id. at 341, the answer must be yes.

The appropriations establish a substantial array of legal requirements that otherwise do not exist in Missouri law. They essentially create the rules and regulations by which the family planning program must operate, complete with definitions of terms, exceptions to eligibility restrictions, requirements concerning financial record-keeping and audits by independent audit firms approved by the Director, even regulations concerning what may and may not be included on referral lists given to patients.

Frequently, in determining whether an appropriation impermissibly legislates substantively, this Court has looked to whether the challenged provision amends existing substantive law. Where an appropriation does amend existing substantive law, the offending portion is unconstitutional, "because a statute that makes an appropriation and also amends a general statute would contain more than one subject . . . " Rolla 31 Sch.

Dist. v. State, 837 S.W.2d 1, 4 (Mo. 1992). See also Opponents of Prison Site, Inc. v. Carnahan, 994 S.W.2d 573, 580 (Mo. Ct. App. 1999) (appropriation cannot amend substantive legislation because such an amendment would violate the constitutional requirement that no bill contain more than one subject).

This inquiry should be unnecessary here because of the substantial new law created by the appropriations. Nonetheless, the appropriations' labyrinth of restrictions amend Mo. Rev. Stat. §188.205 ("Use of public funds prohibited, when"). That statute states:

> It shall be unlawful for any public funds to be expended for the purpose of performing or assisting an abortion, not necessary to save the life of the mother, or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

The appropriations amend §188.205 in at least two ways. First, §188.205 enunciates a state policy, "'directed . . . at those persons responsible for expending public funds,'" Webster v. Reproductive Health Servs., 492 U.S. 490, 511 (1989), including the Director, that focuses only on limiting the uses to which public funds are put. Yet, the appropriations dramatically alter that policy by elaborately regulating both the activities (not funded by the appropriations) of program participants, and the details of the relationship between a program participant and a provider of abortion services. Second, §188.205 permits the use of public funds to counsel a woman to have an abortion, where necessary to protect her life, and presumably also permits the use of public funds to refer

a woman for an abortion, at least when her life is endangered. Yet the appropriations forbid that counseling and those referrals.

The provisions of the appropriations that go beyond "set[ting] aside moneys for specified purposes," Hueller, 289 S.W. at 340, must be stricken. See Hueller, 289 S.W. at 341; State ex rel. Gaines, 113 S.W.2d at 790; Board of Educ. of City of St. Louis v. State, 47 S.W.3d 366, 371 (Mo. 2001). Such a holding does not prevent the Legislature from enacting the exact same restrictions. It simply upholds the constitutional requirement that the Legislature do so in legislation devoted to the subject of permissible activities, and eligibility for participation, in the state family planning program, and that the Legislature not impose these rules by holding entire appropriations hostage to their enactment into law. Hueller, 289 S.W. at 340.

POINT IV

The Trial Court Erred In Concluding That The Director's Construction Of Undefined Terms In The Appropriations Was Illegal And That Planned Parenthood Was Not Eligible And Should Be Enjoined From Participating In The Program, Because The Construction Of Terms In A Statute By The State Official Charged With Its Implementation Is Entitled To Deference And Should Be Sustained Unless It Is Shown That The Official's Construction Is Not Reasonably Related To The Statute's Purpose; The Director's Construction Here Should Be Sustained Under This Standard In That The Director's Construction Of The Terms At Issue

Reasonably Implements The Permissible Intent Of The Legislature That State Funds Not Subsidize The Provision Of Abortion Services While Avoiding Constitutional Problems And Being Consistent With Other Statutes *In Pari Materia*

The trial court found Planned Parenthood ineligible for the program because they had names that were "similar" to those of their abortion affiliates, and because they "shared" facilities, wages, expenses, and equipment. P.R.L.F. at 361; A30. Although the trial court judgment makes no mention of the Director's construction of these undefined terms in the appropriations, P.R.L.F. at 359-364; A28-33, it could not have found Planned Parenthood ineligible without invalidating her construction. This was erroneous.

First, the undefined terms for which the Director provided construction that the trial court invalidated—"share," and "similar name"—are ambiguous, and amenable of multiple understandings and applications. A prime Senate sponsor of the appropriation acknowledged that "there's several definitions of what 'share' could mean." L.F. at 1409. Further, while the word "similar" may have a "dictionary meaning" of things that are alike, that definition does not provide the kind of clarity necessary for a legal definition that must be applied consistently and objectively to determine when names are "alike," and when they are not "alike."

Thus, it was the responsibility of the Director to construe these terms. Abrams v. Ohio Pac. Express, 819 S.W.2d 338, 340 (Mo. banc 1991) (where statute's terms are not defined and are subject to different interpretations, it is necessary for the statute to be interpreted).

Second, the Director's construction of the undefined terms was reasonable, particularly in light of her responsibilities to reasonably achieve the legislative intent while avoiding constitutional issues and being consistent with other statutes *in pari materia*.

"[T]he interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193, 197 (Mo. 1972). See also Linton v. Missouri Veterinary Med. Bd., 988 S.W.2d 513, 517 (Mo. banc 1999). The burden here is on the State to demonstrate that the Director's interpretation bears "no reasonable relationship" to the legislative intent. Foremost-McKesson, 488 S.W.2d at 197. See also Heavy Constructors Ass'n v. Division of Labor Standards, 993 S.W.2d 569, 571-72 (Mo. App. W.D. 1999); Pen-Yan Inv. v. Boyd Kansas City, Inc., 952 S.W.2d 299, 303 (Mo. App. W.D. 1997) (defer to administrative interpretation unless it is unreasonable and plainly inconsistent with the legislative objective, and there are weighty reasons to invalidate). The State has not met that burden.

The Legislature's intent is stated in the appropriations:

> For the purpose of funding family planning services. . .[N]one of these funds appropriated herein may be expended to directly or indirectly subsidize abortion services or administrative expenses. . .

> To ensure that the state does not lend its imprimatur to abortion services, and to ensure that an organization that provides abortion services does not receive a direct or indirect economic or marketing benefit from these funds . . .

L.F. at 0014-15; P.R.L.F. at 46-47.

In addition to interpreting the appropriations consistently with this statement of intent, the Director had two other clear duties to guide her task. First, she had a duty to choose an interpretation that would avoid rather than create constitutional problems. State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876, 883 (Mo. 1934).[15] Second, she had to give the undefined terms an objective framework that could be applied with consistency and certainty in determining eligibility. Towards this end, she was obligated to construe the appropriations consistently with other statutes *in pari materia,* "even though [those] statutes are found in different chapters and were enacted at different times." Romans v. Director of Revenue, 783 S.W.2d 894, 896 (Mo. banc 1990).

[15] In discussing the Director's duty to adopt construction that avoids constitutional problems, Planned Parenthood refers to federal cases that discuss some of these constitutional issues. They do this to illustrate the shoals within which the Director had to work, not to litigate the constitutional issues here. Planned Parenthood has reserved their right to litigate the federal constitutional issues, if necessary, in the pending federal action. See supra note 2.

In fulfilling the first duty, the Director was not writing on a blank slate. The federal Court of Appeals for the Eight Circuit in Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Dempsey recognized that, while a state may "validly choose to fund family-planning services but not abortion services," the state could not, as a condition of funding, prohibit a family planning grantee from being affiliated with an abortion provider, so long as that abortion provider is "independent." 167 F.3d 458, 461-63 (8th Cir. 1999). Dempsey explained what it meant by "independent:"

> To remain truly "independent," however, any affiliate that provides abortion services must not be directly or indirectly subsidized by a [family planning] grantee. This will ensure that State funds are not spent on an activity that Missouri has chosen not to subsidize. No subsidy will exist if the affiliate that provides abortion services is separately incorporated, has separate facilities, and maintains adequate financial records to demonstrate that it receives no State family-planning funds.

Id. at 463 (citations omitted) (emphasis added). See also id. at 464 (stating that these requirements ensure that the abortion affiliate does not receive benefits in the form of marketing, fixed expenses, or state family planning funds from grantee).

Thus, in construing the undefined terms in the appropriations, the Director was necessarily mindful that Dempsey indicated the limits as to how far a state could go to achieve the permissible purpose of ensuring that its family planning funds do not subsidize abortion. The limit is separate incorporation, separate facilities, and financial

records that establish that the abortion affiliate does not receive state family planning funds.

An evaluation of the Director's construction of the term "share" requires, first, an understanding of how the Director construed another undefined term in the appropriations: "administrative expenses." She construed that term to include any budget category that cannot be traced to the direct delivery of services. Under this construction, state funds can only subsidize the direct delivery of the family planning services; the funds cannot be used to subsidize any other expense. This construction prevents state funds from being used for any indirect expenses such as those (e.g., rent, utilities, book-keeping, etc.) that Planned Parenthood's abortion affiliates purchase from them. Thus, the state funds do not even indirectly reach the abortion affiliates because the services purchased by the abortion affiliates are services that are not subsidized by the state funds; they are services financed solely from other funding sources.

The Director's construction of "share," in effect, backstops her construction of "administrative expenses." It requires that any service or facility provided by a program participant to its abortion affiliate be purchased by the abortion affiliate at a fair market rate, even though that service or facility was first purchased by the program participant with non-state funds.

Thus, the Director has both prevented state funds from being used to finance any activities other than direct family planning services, and also required program participants to obtain reimbursement from abortion affiliates for any of the administrative expenses provided to the abortion affiliates, even though those administrative expenses

were not financed by state funds. Together, these requirements assure that the Legislature's purpose that state funds not subsidize the abortion-providing affiliates is fully implemented. These interpretations avoid constitutional problems by not construing these terms (as the SAAG advocates) to make affiliation with an abortion provider virtually impossible.

In fulfilling her second duty, the Director properly interpreted the appropriations by reference to Missouri's corporation statutes. Those statutes are aimed at preventing a corporate name from being "so nearly similar to that of another corporation. . . as to lead to confusion and uncertainty. . . ." Mo. Rev. Stat. § 349.035. They are therefore *in pari materia* with the statute's "similar names" requirement, and the Director had a duty to construe the appropriations consistently with the corporation statutes.

Moreover, while Dempsey recognized that a state could require separate incorporation, Dempsey made no mention of the permissibility of the state putting any limitation on the names of the independent affiliates. To have done otherwise would have run afoul of a long line of Supreme Court precedent. See also FCC v. League of Women Voters, 468 U.S. 364, 395, 396 n.25 (1984) (rejecting fear of confusion as justification for fund restriction); Capitol Square Review v. Pinette, 515 U.S. 753, 769 (1995) (same); Regan v. Taxation With Representation, 461 U.S. 540, 552-53 (1983) (Blackmun, J., concurring) (noting that IRS requirement of separate incorporation of 501(c)(3) and 501(c)(4) organizations must allow one to lobby explicitly on behalf of the other). Thus, by following the corporation statutes approach, the Director both fulfilled her duty to interpret the appropriations consistently with statutes *in pari materia,* and

minimized the risk of creating a constitutional issue by not going beyond what was discussed in Dempsey.

The Director's construction can hardly be viewed as having "no reasonable relationship" to the legislative intent. Foremost-McKesson, 488 S.W.2d at 197. The construction of "share" and "administrative expenses" doubly assure that the abortion affiliates receive no state funds. The construction of "similar name" is, as it should be, tied to the other state statutes that have the goal of avoiding confusion among corporate names. All three interpretations avoid constitutional problems by going no further than indicated in Dempsey. Accordingly, particularly after according the Director appropriate deference, these interpretations must be upheld; and then the holding that Planned Parenthood is not eligible must be reversed.

POINT V

The Trial Court Erred In Construing The Appropriations' Prohibitions Against "Counseling Patients To Have Abortions," "Distributing Marketing Materials About Abortion Services," And Providing "Direct Referrals" To Abortion Providers To Include Planned Parenthood's Practices, Because The Trial Court's Construction Of Those Terms Was Unreasonable, In That Those Terms Cannot Reasonably Be Construed To Include Practices Revealed By The Record: The Provision Upon A Patient's Request Of Factual, Non-Directive Information About Abortion, And A List Of Providers Of Abortion Services.

The trial court found that Planned Parenthood "directly referred patients to abortion providers . . . distributed marketing materials about abortion services . . . and . . .

counseled patients to have abortions." P.R.L.F. at 361; A30. The trial court also found, however, that Title X required Planned Parenthood "to perform the services, as set forth in the record before the Court, that constitute" the direct referrals, marketing materials, and counseling to have an abortion. P.R.L.F at 361–362; A30-31. Thus, because the appropriations state that their restrictions are not to be applied to prevent a grantee from providing services mandated by Title X, the trial court found that Planned Parenthood was not disqualified from the program for these practices.

While Planned Parenthood agrees with the trial court's Title X ruling, they dispute the trial court's construction of the terms "direct referral," "marketing material," and "counseling . . . to have abortions.[16]" As the trial court was clear that it was finding that the practices "in the record" ran afoul of these terms, it is best to begin by reviewing what the undisputed facts are.

[16] The State has appealed the trial court's Title X ruling. Even if this Court agrees with the trial court on the Title X question, it should reach and reverse the trial court's conclusions on "direct referral," "marketing material," and "counseling patients to have abortions." The Legislature remains free to alter or eliminate the Title X proviso, see House Bill No. 10 § 10.710 (2001) (appropriation for family planning program for FY 2002), in which case the trial court's conclusions would govern all program participants. Even if the Legislature does not eliminate the Title X proviso, the trial court's conclusions, which are patently unreasonable, govern the counseling and referral practices of program participants who are not Title X recipients.

Planned Parenthood offers counseling to women who are diagnosed as pregnant. L.F. at 1805, 1807, 1817, 1827, 1932. In that counseling, Planned Parenthood provides complete, factual, objective information about any and all of the specific medical options in which the woman is interested. Id. The counseling could focus solely on abortion, or on any other option in which the woman is interested, and the woman could leave one of Planned Parenthood's facilities with information about only one option for managing a pregnancy, even abortion, depending on her expressed interests. L.F. at 0357, 0363, 1796, 1799, 1808.

In the process of providing information, Planned Parenthood sometimes provides patients with written materials. Two such pamphlets are included among the undisputed facts: "Abortions Questions and Answers," (L.F. at 2072–2079) and "Coping Successfully After An Abortion." (L.F. at 0868–0890). Any objective reader of "Abortions Questions and Answers" would recognize that it is a factual document that provides accurate, non-directive information to a woman contemplating an abortion. Likewise, "Coping Successfully After An Abortion" only presents suggestions for coping with the various emotional responses that follow an abortion.

Planned Parenthood provides referrals to services in which the woman expresses an interest. L.F. at 1804, 1807, 1827, 1931–2. The referrals are lists of providers of the particular service (or services) in which the woman expresses an interest. Planned

Parenthood does not take further steps beyond providing the list.[17] As a result of these practices, a pregnant woman could leave one of Planned Parenthood's facilities with a referral list for only one option for managing a pregnancy, even abortion, depending on her expressed interests.

Apparently, the trial court regarded these practices as constituting counseling a woman to have an abortion, distributing marketing materials, and making direct referrals. That is wrong.

The counseling is non-directive, factual, and objective. Then, the woman decides what option to choose. That is admittedly counseling about abortion. However, it cannot reasonably be found, as a matter of state law, to be counseling to have an abortion. This Court should rule that the trial court misconstrued the term "counseling patients to have an abortion," and that that term does not encompass providing a woman with nondirective and factual information about abortion.

The two pamphlets provide objective and factual medical information. "Marketing," however, conveys the idea of selling. See Sitzes v. Raidt, 335 S.W.2d 690,

[17] PPKM also provides women who indicate that they will contact CHS (which is in Kansas) for their abortion, with a document required by Kansas law to be given to a woman at least 24 hours before her abortion. L.F. at 0363, 1799, 1807–1808. The form indicates the name of the abortion provider and provides basic information about the abortion procedure and the name of the physician providing the abortion. See Kan. Stat. Ann. § 65–6709.

699 (Mo. Ct. App. 1960). These documents cannot be found to fit within that term. This Court should rule that the trial court misconstrued the term "marketing materials;" that that term encompasses materials that convey a sales message; and that neither of the documents in this record are "marketing materials."

When Planned Parenthood makes a referral, they provide the names, addresses, and phone numbers of several providers of the medical option chosen by the patient. Then the patient must choose a provider from the list, contact the provider on her own, and make whatever further arrangements are necessary. These cannot be deemed "direct referrals." A direct referral would presumably involve giving a patient the name of only one provider with, perhaps, further efforts (e.g., calling to make an appointment) to "direct" the patient to the specific provider. This Court should rule that the trial court misconstrued the term, "direct referral," that that term embraces practices that involve directing a patient to a particular provider; and that Planned Parenthood's practices do not fit within the meaning of that term.

On August 2, 2001, the U.S. Department of Health and Human Services ("HHS") issued a letter that discussed the relationship between the practices not permitted by the appropriations, and the practices mandated by Title X. See Letter from the U.S. Department of Health and Human Services to Susan Hilton, August 2, 2001 (located at A34-36).[18] The letter concludes that the restrictions in the FY 2002 appropriation (which

[18]HHS issued the letter because the FY 2002 appropriation requires a "final," non-appealable order directing that Title X grantees provide services that may be forbidden

are the same as the appropriations at issue on this appeal) and the requirements in the Title X regulations, "can be read as not inconsistent with each other." A34.

The trial court, however, construed them as inconsistent with each other. The trial court found that Planned Parenthood's practices were mandated by Title X, and that they violated the appropriations' prohibitions against "counseling patients to have abortions," "marketing materials," and "direct referrals."

The trial court was wrong; and HHS is right. This Court should construe these terms as Planned Parenthood has urged and, thereby, provide state law construction that are, as HHS suggested, consistent with Title X.

POINT VI

The Trial Court Erred In Voiding The Director's Construction Of The Appropriations And Permanently Enjoining Planned Parenthood From Participating In The Program, Because After Voiding An Executive's Construction Of A Statute, A Court Should Either Construe The Statute Or Remand To The Executive With Instructions That She Do So, And Should Allow The Parties Reasonable Time To Achieve Compliance With The New Construction; The Trial Court's Judgment Is Deficient In That It Does Not Set Forth The Proper Construction Of The Appropriations, Or Remand To The Director For Her To Do

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under the appropriation. The Missouri Department of Health subsequently announced that it would deem the August 2 letter as such an order. See Letter from the Missouri Department of Health to Susan Hilton, August 8, 2001 (located at A37).

So, And Does Not Allow Planned Parenthood A Reasonable Opportunity To Comply With A New Construction Of The Appropriations.

Without explicitly saying so (but undeniably doing so), the trial court voided the director's construction of the appropriations. P.R.L.F. at 359–363; A28-32. Then, the trial court found Planned Parenthood ineligible for the family planning program, and permanently enjoined their participation until they complied with the appropriations' restrictions. P.R.L.F. at 363. Yet, the trial court never explained what was wrong with the Director's construction, nor did the trial court give any indication as to the proper construction. P.R.L.F. at 359–364. Thus, Planned Parenthood and, presumably, the Director are left without guidance as to what would constitute a proper construction of the appropriations and compliance with the appropriations' restrictions.

Once a court concludes that an executive's construction of a statute is illegal, a court should enunciate its view of the legally correct interpretation of the statute, or it should remand the matter to the executive with instructions to guide her in promulgating a new construction, and then allow the parties reasonable time to achieve compliance with the new restriction. That is the usual course and its purpose is obvious and equitable: to allow affected parties an opportunity to come into compliance with changed rules. See e.g., Carlin Communications, Inc. v. FCC, 837 F.2d 546, 561 (2d Cir. 1988) (after upholding new regulations, Second Circuit stays issuance of mandate to allow parties to comply with regulations); Chemical Waste Mgmt. v. EPA, 976 F.2d 2, 35-36 (D.C. Cir. 1992) (after upholding new regulations, D.C. Circuit stays issuance of mandate); AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 397 (1999) (after explaining

flaws with FCC rule implementing statute, Supreme Court remands to FCC); Chicago and N.W. Transp. Co. v. United States, 582 F.2d 1043, 1060-61 (7th Cir. 1978) (ICC regulations found invalid and remanded to ICC for further proceedings). See also Mo. Rev. Stat. §§536.019, 536.028(4) (providing minimum period of 30 days between time a new rule is announced and time it takes effect); 5 U.S.C. § 553(d) (same).

The effect of the trial court's holding was to void the Director's construction of the appropriations. Yet, the trial court neither gave guidance as to what would be a proper construction of the undefined terms, nor remanded the matter to the Director for her to do so. This leaves Planned Parenthood with no guidance as to what steps they could take to achieve compliance: What changes in their names or the names of their abortion-affiliates would make those names sufficiently dissimilar? What changes in facility arrangements, or staffing patterns, would satisfy the restriction against sharing?

The trial court's failure either to enunciate a clear construction of the appropriations, or to remand the matter to the Director with instructions that she do so, was not only legally wrong, it was particularly problematic given the trial court's other ruling that Planned Parenthood must repay the State funds already received for services provided under a program contract.[19] That ruling, in the absence of a definitive construction of the appropriations, places program participants perpetually at risk that a court will find subsequent construction of the appropriations or subsequent efforts at compliance also illegal, and then the participants will be required to repay more funds for

[19] See infra Point VII.

services already rendered. The trial court had a duty to put this confusion to rest, either by construing the appropriations, or remanding to the Director with appropriate guidance for the same purpose.

It is error for a court to void an administrative construction of a statute, declare two different entities ineligible for participation in the program created by the statute, and enjoin them from participating until they comply with the statute, while not offering any explanation or construction of the statute to delineate what standards would determine eligibility, or remanding the matter to the administrative agency to enable it to do so, and allowing the parties reasonable time to comply with the new standards.

POINT VII

The Trial Court Erred In Ordering Planned Parenthood To Repay Funds Already Received, Because The Director Had Legal Authority To Enter Into The Contracts, And Planned Parenthood Was Entitled To Rely On Her Construction Of The Statutory Terms, In That The Director Is The Executive Official Responsible For Implementing The Family Planning Program And Planned Parenthood Is Only Charged With The Duty Of Being Sure That The Person Contracting On Behalf Of The State Is Authorized To Do So.

The trial court ordered Planned Parenthood to repay the State funds received by Planned Parenthood under the FY 2000 contract.[20] These were funds paid to Planned Parenthood for services rendered by Planned Parenthood. Planned Parenthood was in compliance with the contract and the Director had the authority to enter into the contract. Under these circumstances, even if Planned Parenthood is found ineligible for the program because the Director misconstrued undefined terms in the appropriations, there is no legal authority, and it is inequitable, to order that the funds be repaid.

This Court has consistently held that persons entering into contracts with agents of the state are charged with knowledge of the authority of the agent, and whether the contract is within the agent's authority. See e.g., Aetna Ins. Co. v. O'Malley, 124 S.W.2d 1164, 1166 (Mo. 1938). Here, there is no question that the Director had the authority to enter into contracts for the provision of family planning services.

In order for this Court to conclude that Planned Parenthood is not eligible for the program, it must conclude that the Director misconstrued undefined terms in the appropriations. This factor, however—the correctness of the executive's legal analysis of the undefined terms of the statute which she is charged with implementing—is not something this Court has ever required of a party contracting with a State agency. Under these circumstances, while it may be proper to enjoin the contract until such time as Planned Parenthood complies with a new construction of the statute, there is no authority,

[20] The trial court made the same order for FY 2001; however, Planned Parenthood never received funds under that appropriation.

and it would be inequitable, to compel repayment of funds received for services provided under a contract that was within the authority of the Director.

Accordingly, even if this Court agrees that the Planned Parenthood was not eligible under the FY 2000 appropriation, it should vacate that portion of the trial court order that requires Planned Parenthood to repay funds received under that appropriation.

POINT VIII

The Trial Court Erred In Declaring The Appropriations Constitutional Under The United States Constitution, Because The United States Supreme Court Has Expressed Confidence That The State Courts Will Not Address Claims Reserved By A Federal Court When That Court Abstains; The Federal Constitutional Issues Were Reserved In That The United States District Court Issued An Abstention Order In Planned Parenthood v. Dempsey, No. 99-4145-CV-C-5 (W.D. Mo. filed June 22, 1999), In Which That Court Reserved The Issue Of The Constitutionality Of The Appropriations Under The United States Constitution For Resolution In Federal Court.

When a federal civil rights plaintiff is required to litigate the construction of a state statute in state court, pursuant to an abstention order, that plaintiff may reserve his right to litigate his federal claims in federal court—and not be compelled to litigate them in the state court proceeding—by advising the state court on the record of the nature of his federal claims and of his reservation of those claims for disposition in federal court. England, 375 U.S. at 419-422. Further, when a federal plaintiff makes such an

"England" reservation, the Supreme Court expressed "confiden[ce] that state courts… will respect a litigant's reservation of his federal claims for decision by the federal courts." Id. at 421 n.12.

Planned Parenthood repeatedly made such reservations in the trial court. L.F. at 0043, 0082, 1370–1371, P.R.L.F. at 76–77. Therefore, this Court should uphold the United States Supreme Court's confidence in the state courts, and should vacate the trial court's holding on the constitutionality of the appropriations under the U.S. Constitution.

CONCLUSION

For the reasons set forth in this brief, the judgment of the trial court should be reversed. This Court should order that the First and Second Counts should be dismissed: (1) because the State is not authorized, and thus lacks standing, to pursue claims against the Director; (2) because, if the State were authorized to bring such claims, nonetheless the State lacks standing to do so, and the claims are non-justiciable; and (3) because, if the State is authorized and has standing to bring the claims and the claims are justiciable, then the State has failed to demonstrate that the Director's construction of the appropriations is illegal, and Planned Parenthood is eligible for the program under the Director's construction of the appropriations. This Court should dismiss the Third Count because the appropriations' restrictions violate Article III, Section 23, of the Missouri Constitution, and because the trial court should respect the order of the federal court reserving its right to adjudicate the federal constitutional questions. This Court should also rule that the trial court's construction of the statutory terms "counseling patients to

have abortion," "marketing materials," and "direct referrals" is in error, and this Court should construe those terms as urged in Point V of this brief. This Court should also rule that the trial court erred in declaring Planned Parenthood ineligible for the program and enjoining Planned Parenthood from participating in the program, and in failing either to definitively construe the appropriations or to remand the matter to the Director with instructions for promulgating a proper construction, and in failing to allow Planned Parenthood a reasonable time within which to comply with a new construction of the appropriations. This Court should also rule that the trial court erred in ordering Planned Parenthood to repay funds already received under the appropriations.

Dated: November ___, 2001 Respectfully submitted,

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APPELLANTS' RULE 84.06 CERTIFICATE

Come now appellants, by and through counsel and certify to the Court that the foregoing brief, and all copies filed and served in accordance with Rule 84.06(g):

1. Comply with Rule 55.03

2. Comply with the limitations set forth in Rule 84.06(b); and

3. Contain 20,317 words according to Microsoft Word software.

Appellants also certify that a copy of the foregoing brief was stored on an IBM-PC compatible 1.44 MB, 3 ½ -inch size floppy disk which was scanned for viruses with Norton Anti-Virus software, and that according to said software, the floppy disk and all copies of same were virus free.

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On this _____ day of November, 2001, a copy of the foregoing brief, in both the format required pursuant to Rule 84.06(b) and 84.06(g) was served on all counsel of record, via Federal Express, to:

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